1457 MAIL THEFT — § 943.204

Statutory Definition of the Crime

Section 943.204 of the Criminal Code of Wisconsin is violated by one who intentionally takes or receives the mail[1] of another from a residence or other building or the curtilage of a residence or other building without the other's consent and with intent to deprive the other permanently of possession of such mail.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements are present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally (took) (received) mail intended for (name of victim(s)) from a (residence) (building) (curtilage of a residence) (curtilage of a building).[2]

   The term "intentionally" means that the defendant must have had the mental purpose to take possession of the mail.[3]

2. (Name of victim(s)) did not consent[4] to the (taking) (receiving) of the mail.

3. The defendant knew that (name of victim(s)) did not consent.[5]

4. The defendant intended to deprive (name of victim(s)) permanently of the possession of the mail.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF FELONY MAIL THEFT IS CHARGED, A JURY DETERMINATION OF THE AMOUNT OF MAIL MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE AMOUNT OF MAIL WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[6]

[Determining Amount of Mail Taken]

[If you find the defendant guilty, you must answer the following questions:

("Was the amount of mail taken or received from one or more individuals in a course of conduct at least 30 pieces?"

Answer: "yes" or "no".)

(Was the amount of mail taken or received from one or more individuals in a course of conduct at least 10 pieces?

Answer: "yes" or "no".)

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that

the amount of mail taken or received was at least the amount stated in the question.

If you are not so satisfied, you must answer the question "no."]

ADD THE FOLLOWING FOR FELONY CASES INVOLVING MORE THAN ONE THEFT FROM ONE OR MORE OWNERS "DURING A COURSE OF CONDUCT," AS PROVIDED IN § 971.36(3)(d).[7]

In determining the amount of mail taken or received, you may consider all thefts that you are satisfied beyond a reasonable doubt were from one or more owners and committed by the defendant during a course of conduct[8].

IF FELONY MAIL THEFT IS CHARGED, A JURY DETERMINATION OF THE VICTIM STATUS MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VICTIM WAS AN ADULT AT RISK OR AN ELDER ADULT AT RISK.[9]

[Determining Victim Status]

[If you find the defendant guilty, you must answer the following question:

("Was the mail taken or received addressed to an (adult at risk) (elder adult at risk?))[10]

Answer: "yes" or "no".)

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the mail taken or received was addressed to an (adult at risk) (elder adult at risk).

If you are not so satisfied, you must answer the question "no."]

COMMENT

Wis JI-Criminal 1457 was approved by the Committee in August 2022.

This instruction is for violations of § 943.204, created by 2019 Wisconsin Act 144 [effective date: March 5, 2020]. Act 144 also created new provisions relating to charging violations as a single crime if the property was mail and it was stolen from one or more owners during a course of conduct, as defined in § 947.013(1)(a) [new § 971.36(3)(d)].

The basic offense is a Class A misdemeanor. The penalty increases to a felony if the number of pieces of mail taken or received from one or more individuals in a course of conduct exceeds a specific amount. See footnote 5, below. The penalty also increases to a felony if the mail taken or received was addressed to an adult at risk or and elder adult at risk. See footnote 8, below.

1. Mail is defined as follows in § 943.204(d):

> "Mail" means a letter, flat, postcard, package, bag, or other sealed article that is delivered by the U.S. postal service, a common carrier, or a delivery service and is not yet received by the addressee or that has been left to be collected for delivery by the U.S. postal service, a common carrier, or a delivery service.

2. Wis. Stat. § 943.204 does not define "curtilage." Additionally, nothing in the legislative history indicates the intended scope of the term, and Wisconsin law does not sufficiently address this topic. Therefore, the Committee concluded that further definition in the instruction could not be provided with substantial assurance of accuracy.

However, if theft from the curtilage of a residence or a building is alleged, the term may need to be defined for the jury. If requested, the definition of "curtilage" included in similar "theft of mail" statutes from other jurisdictions may provide guidance as to the term's meaning. For example, in T.C.A. § 39-14-129 "mail theft," the Tennessee legislature defines "curtilage" as follows:

> "Curtilage" means the area surrounding a dwelling that is necessary, convenient and habitually used for family purposes and for those activities associated with the sanctity of a person's home.

Additionally, trial courts may gain some guidance by reviewing Wisconsin case law decisions that consider what constitutes "curtilage" for Fourth Amendment purposes. The Committee notes, however, that any factors that bear upon this consideration may not be ideally suited for defining the term in the context of criminal liability.

In State v. Dumstrey, 2016 WI 3, ¶32, 366 Wis.2d 64, 873 N.W.2d 502, the Wisconsin Supreme Court reviewed the term "curtilage" as applied for Fourth Amendment purposes. The court noted the four factors set forth by the United States Supreme Court in United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987) that it previously adopted as relevant to analyzing whether an area constitutes curtilage of a home.

(1) "the proximity of the area claimed to be curtilage to the home";
(2) "whether the area is included within an enclosure surrounding the home";
(3) "the nature of the uses to which the area is put [;] and"

(4) "the steps taken by the resident to protect the area from observation by people passing by."

However, the court noted that it does not "mechanically" apply these factors as part of a "finely tuned formula." Dumstrey, supra, at ¶32. Instead, these factors "'are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." Id.

3. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

4. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948 which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

5. Knowledge that the taking was without consent is required because the definition of this offense begins with the word "intentionally." Section 939.23(3) provides that the word "intentionally" requires "knowledge of those facts which are necessary to make [the] conduct criminal and which are set forth after the word 'intentionally'" in the statute.

6. The penalties provided in subs. (3)(a) through (c) are as follows:

- If fewer than 10 pieces of mail are taken or received from one or more individuals in a course of conduct, a Class A misdemeanor.
- If at least 10 but fewer than 30 pieces of mail are taken or received from one or more individuals in a course of conduct, a Class I felony.
- If 30 or more pieces of mail are taken or received from one or more individuals in a course of conduct, a Class H felony.

While the number of pieces of mail taken or received may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to pieces of mail taken or received.

7. Section 971.36 sets forth a number of rules relating to the pleading and prosecution of theft cases. Subsection (3) allows the prosecution of more than one theft as a single crime if one of the following applies:

(a) The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.

(b) The property belonged to the same owner and was stolen by a person in possession of it.

(c) The property belonged to more than one owner and was stolen from the same place pursuant to a single intent and design.

(d) If the property is mail, as defined in s. 943.204(1)(d), the property was stolen from one or more owners during a course of conduct, as defined in 947.013(1)(a).

The legislature in § 971.36(3)(a) has explicitly provided prosecutors with discretion to charge multiple thefts as a single crime when "the property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme." See State v. Jacobsen, 2014 WI App 13, 352 Wis. 2d 409, ¶20, 842 N.W.2d 365, 13-0830.

The material in the instruction addresses the situation defined in subsec. (3)(d): property was stolen from one or more owners during a course of conduct. There is no Wisconsin case law interpreting this aspect of § 971.36.

Reading § 943.20(1)(a), the statute concerning theft of movable property, in conjunction with § 971.36(3)(a) and (4), the court of appeals in State v. Elverman, 2015 WI App 91, 367 Wis. 2d 126, ¶30, 876 N.W.2d 511 saw no other reasonable interpretation but that multiple acts of theft occurring over a period of time may, in certain circumstances, constitute one continuous offense that is not complete until the last act is completed.

The Committee's research on the issue of whether this need be submitted to the jury can be summarized as follows: (1) there is no case law dealing with § 943.204; (2) an instructive case, State v. Spraggin, dealt with a similar situation in the context of receiving stolen property; and (3) while there may be equally effective ways of dealing with the issue, the Committee concluded that the question of whether all mail was stolen from one or more owners during a course of conduct must be submitted to the jury.

State v. Spraggin, 71 Wis.2d 604, 239 N.W.2d 297 (1976), dealt with the receipt of several articles of stolen property. Spraggin was charged with a felony offense, based on the receipt of multiple stolen articles (valued at more than $500) at one time. The applicable statute, § 943.34, did not have a provision like § 971.36, so the court held that lumping multiple articles together was proper only if they were received at one time. If there were separate receipts, separate misdemeanor charges would have been required, and a felony charge could not be supported. The case was presented to the jury as a felony, but the jury found the value of the goods received as $180. The court entered judgment on the basis of the felony conviction, apparently relying on the prosecutor's contention that a 25 inch color TV was worth more than $500. The supreme court reversed, holding that, at most, two misdemeanors were committed.

The Spraggin court held that presenting the case to the jury solely as a felony "was in effect a decision on the grade of the offense, which is clearly an issue only for the jury." (71 Wis.2d 604, 615, citing State v. Heyroth, the case holding that finding value in a theft case is for the jury.) The court went on to point out that there are optional ways of proceeding in a case like this:

> Since variances between the allegations and the proof may be beyond the control of the state, see: People v. Smith (1945), 26 Cal.2d 854, 161 Pac.2d 941; State v. Niehuser (Or. App. 1975), 533 Pac.2d 834; People v. Roberts (1960), 182 Cal. App.2d 431, 6 Cal. Rptr. 161, one option is to charge in the alternative. Likewise, the defense could request, or the state on its own, could submit the alternative charges of a single or multiple receptions, when, as in cases of lesser included charges, see: Devroy v. State (1942), 239 Wis. 466, 1 N.W.2d 875; State v. Melvin (1970), 49 Wis.2d 246, 181 N.W.2d 490, a reasonable view of the evidence reveals that there is a reasonable basis for conviction on either. With the alternatives phrased in terms of separate or

joint receptions of multiple stolen items, the jury may decide on the evidence and thereafter grade the offense through the establishment of value.

71 Wis.2d 604, 616 17.

Submitting the issue to the jury seems to be required by the Spraggin case because it goes to "the grade of the offense." This is consistent with the position the Committee has taken in similar situations in the past: if a fact determines whether a different range of penalties applies (e.g., changes a crime from a misdemeanor to a felony or from one class of felony to another), it is for the jury; if a fact only influences the length of possible sentence within a statutory range, it is for the judge.

The Committee concluded that it would be more effective, or at least more efficient, to leave the multiple pieces of mail decision question alone. The instruction can be used without change for either a misdemeanor or a felony charge. If satisfied that the offense was committed with regard to "any item of mail," the jury should find the defendant guilty. Then, in determining the number of pieces of mail taken or received, the jury should include "all thefts which you find, beyond a reasonable doubt, were from one or more owners and committed by the defendant during a course of conduct."

8. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. See § 947.013(1)(a).

9. The special question addresses the penalty-increasing facts in § 943.204(3)(d). A violation of § 943.204(3)(d) is a Class H felony.

10. § 943.204(3)(d) provides a penalty enhancement if the mail that is taken or received is addressed to an adult at risk or an elder adult at risk. The definitions of "adult at risk" and "elder adult at risk" provided in other statutes. The cross-referenced definitions are as follow:

- "Adult at risk" means any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. See § 55.01(1e).

- "Elder adult at risk" means any person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. See § 46.90(1)(br).